

- Administration
- Bureau of Motor Vehicles
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- Emergency Medical Services
- Office of Criminal Justice Services
- Ohio Homeland Security
- Ohio Investigative Unit
- Ohio State Highway Patrol



January 30, 2013

Liquor Control Commission  
77 South High Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215

Chairman Pryce, Commissioner Booth, Commissioner Shaheen, and Executive Director Williams:

Thank you, on behalf of the Ohio Department of Public Safety (DPS), Ohio Investigative Unit (OIU), for the opportunity to comment on the Liquor Control Commission's (Commission) administrative rule review. Of the eight rules up for review, OIU would like to propose changes to Ohio Administrative Code (O.A.C) sections 4301:1-1-16, Closing authority; 4301:1-1-61, Violations – identification and notification; and 4301:1-1-65, Procedure for hearings before the liquor control commission.

#### Rule 16

This rule requires the Division of Liquor Control (Division) to issue a citation to a permit holder whose business has been closed in excess of thirty days and who has not notified the Division of the closing within thirty days of the last date of operation. OIU would like to add language clarifying that an enforcement agent or the Division shall issue a citation under this section.

#### Rule 61

Upon witnessing a violation and completing an investigation, OIU enforcement agents and Division compliance officers are required to identify themselves and notify permit holders or their agents in writing of the violation. The exception to this rule is if the enforcement agent or compliance officer is conducting an investigation at the express order of the superintendent of the division or the executive director of OIU.

DPS has recently reorganized its divisions, and OIU now falls under the supervision of the Ohio State Highway Patrol. As a result, OIU no longer has an executive director. The appropriate person within OIU to give an express order under this rule is now the enforcement assistant deputy director of administration. OIU is proposing language to reflect this change in rule.

Paragraph (A) of this rule requires that a citation be issued upon witnessing a violation and completion of the investigation. This paragraph has at times been narrowly interpreted to mean that when a violation is witnessed the investigation is completed. However, in some cases an enforcement agent witnesses a violation, but additional steps are needed to complete the investigation. OIU is proposing language to clarify that witnessing a violation and concluding an investigation are not simultaneous events. Therefore, both enforcement agents and compliance officers should be required to issue a citation upon witnessing a violation and within a reasonable time of concluding the investigation into that violation.

#### **Mission Statement**

*"to save lives, reduce injuries and economic loss, to administer Ohio's motor vehicle laws and to preserve the safety and well being of all citizens with the most cost-effective and service-oriented methods available."*

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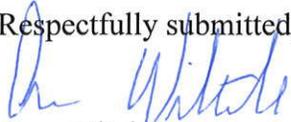
Finally, paragraph (B) of Rule 61 states that the provisions of paragraph (A) do not apply if the investigation is being conducted at the express order of the superintendent of the Division or the OIU executive director. In order to initiate a 61(B) investigation, enforcement agents first need to provide justification for a more in depth investigation. This justification is often based on violations an enforcement agent witnesses prior to obtaining a 61(B) order but does not issue a citation at the conclusion of the investigation because the violation gives the enforcement agent cause to believe a more in depth investigation is required. Because the violations used to support the 61(B) investigation occur prior to the actual order, these violations are often dismissed. OIU is proposing language that will exempt violations that occur prior to an express order under 61(B) but are the violations used to substantiate the 61 (B) order from the provisions of paragraph (A).

Rule 65

This Rule governs the procedures for hearings before the Liquor Control Commission. OIU is proposing language that will authorize the Commission to utilize two-way video in place of in-person witness testimony. The recommended language gives the Commission *the option* to use two-way video testimony. The utilization of two-way video testimony has the potential to create a significant cost savings for the State. While the practical implementation of two-way video testimony requires a great deal of discussion, having the authority to implement this cost effective option is the first step to moving in this direction. The language proposed by OIU includes safe guards to ensure that testimony is the functional equivalent of in-person testimony.

The attached documents are underlined to reflect OIU's proposed changes to these three rules. If you have any questions or concerns about the proposals, please do not hesitate to contact me at 614-387-0414.

Respectfully submitted,



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#### **4301:1-1-16 Closing authority.**

If a permit holder is unable to operate or desires to discontinue the operation of the permit business for a period in excess of thirty days, the permit holder, a majority of the officers, partners, shareholders, or managing members shall notify the division, by affidavit, giving the reason for the request, specifying the last date of operation of the business, and indicating the period of time the permit holder wishes to remain closed. When the permit holder discontinues operation in excess of thirty days it must be for a bona fide reason. The permit holder must also be a bona fide operator. "Bona fide" operator means substantial service, as distinguished from incidental, sporadic, or infrequent service. No closing authority shall extend beyond one hundred eighty days from the last date of operation of the business, except for good cause. During the period of closing authority, the permit premises shall not be used for any other purpose. At the end of the closing authority period, the permit holder shall resume operation. If the permit holder is unable or unwilling to resume operation and no extension of closing authority has been granted, the division shall not renew the permit. Noncompliance with the above provisions shall be grounds for suspension, revocation, or rejection of the permit.

If the division determines the permit business has been closed in excess of thirty days and the permit holder has not notified the division of the closing within thirty days of the last date of operation of the business, the division or an enforcement agent of the investigative unit shall issue a citation to the permit holder for failure to exercise permit privileges and for being closed more than thirty days without the consent of the division.

This rule is only applicable to a permit holder who has operated its permit business for at least six months, unless the permit holder can show a mental illness, physical disability or other just cause necessitating closure of the permit business prior to six months of operation.

R.C. 119.032 review dates: 08/27/2008 and 01/30/2013

Promulgated Under: 119.03

Statutory Authority: 4301.03(B)

Rule Amplifies: 4303.27

Prior Effective Dates: 1-4-54; 7-1-81; 7-10-95; 1-10-99; 3-25-04

**4301:1-1-61 Violation - identification and notification.**

(A) When a compliance officer of the division of liquor control or an enforcement agent of the investigative unit, a division of the department of public safety, witnesses a violation of a provision of the liquor control statutes or a rule of the liquor control commission, the compliance officer or enforcement agent shall, within a reasonable time of upon-completing on of the investigation, identify themselves by presentation of their credentials to the permit holder or the permit holder's agent or employee, and notify the permit holder or the permit holder's agent or employee of the violation, in writing, on the forms prescribed and provided by the division of liquor control or department of public safety. The compliance officer or enforcement agent shall leave the original notice with the permit holder or the permit holder's agent or employee. The compliance officer making such a report shall forward a copy of such notice within forty-eight hours to the division of liquor control and shall retain a copy. The enforcement agent making such a report shall forward a copy of such notice to the central enforcement office, and the appropriate district enforcement office, and shall retain a copy.

(B) The provisions of paragraph (A) of this rule herein shall not be applicable to investigations conducted at the express order of the superintendent of the division of liquor control or the enforcement assistant deputy director of administration executive director of the investigative unit or to any violations witnessed within a reasonable time prior to an express order and which are used to substantiate the need for the superintendent or enforcement assistant deputy director to order an investigation-.

(C) When a request for citation is made to the division of liquor control or the investigative unit by a law enforcement agency, such request must be submitted in writing within thirty days of the date of the alleged violation, except where an arrest has been made in connection with the alleged violation.

Effective: 01/24/2011

R.C. 119.032 review dates: 11/08/2010 and 01/01/2015

Promulgated Under: 119.03

Statutory Authority: 4301.03

Rule Amplifies: 4301.03

Prior Effective Dates: 7/1/81, 7/1/01, 8/7/06

**4301:1-1-65 Procedure for hearings before the liquor control commission.**

(A) When the director of the department of public safety or the superintendent of the division of liquor control, acting pursuant to the provisions of the Liquor Control Act or rules of the commission, cites a permit holder to appear before the commission to show cause why the permit should not be revoked, suspended, or cancelled, the liquor control commission shall, at least fifteen days prior to the date of such hearing, send a notice of such hearing by certified mail, return receipt requested, to the holder of the permit at the address set forth in the permit. Such notice shall specify the alleged violation and the date, time, and place of such hearing, and such hearing shall take place not less than fifteen days after the date of the mailing of such notice by the liquor control commission.

(B) When the superintendent of the division of liquor control refuses to issue, renew, or transfer any permit, the superintendent, or the superintendent's designate, shall by certified mail, return receipt requested, send to the applicant so refused notice of such order to the permit premises and a copy of such notice to the applicant's attorney of record. If the applicant does not have a permit in effect at that location, the notice shall be sent to the applicant's last known address via certified mail, return receipt requested, and a copy of the notice to the applicant's attorney of record. The notice shall set forth the reasons for the superintendent's action, refer to the law or rule directly involved, and state that the applicant shall be afforded a hearing by the commission if requested within thirty days from the date of mailing the notice. When any such notice sent by certified mail, return receipt requested, as required by this rule, is returned because of failure of delivery, the superintendent of the division of liquor control, or the superintendent's designate, shall send such notice by regular mail to the applicant at the applicant's last known address. Any applicant who files a notice of appeal of the order with the commission shall attach a copy of the order to the notice of appeal. No appeal filed more than thirty days from the mailing date of the order shall be heard by the commission except for good cause shown by the appellant.

After receipt of such notice of appeal from the applicant so refused, the commission shall, by certified mail, send to the applicant so appealing, at the address stated in the request for appeal, a notification of the date, time, and place for such hearing and a copy thereof to the attorney of record of the appellant. The date for such hearing shall not be less than seven days or more than fifteen days after the date on which the commission receives the notice of appeal.

In the event that the commission is unable to hear an appeal from an order of the superintendent rejecting an application for renewal of a permit, the commission may, upon application in writing from the applicant, grant in writing such applicant the right to continue operation of the business until such time as an appeal is heard and a final order of such appeal is made by the commission.

This procedure shall be applicable to all other actions of the superintendent which are appealable to the commission.

(C) In all hearings before the commission, the procedure shall be as follows:

(1) The party with the burden of proof must first produce evidence and the respondent may then produce evidence.

(2) The party with the burden of proof may offer evidence in rebuttal.

(3) The commission may, in its discretion, hear arguments.

(D) In all hearings before the commission, and the determination thereon, the production of evidence shall be governed in general by the rules of evidence and burden of proof required by Ohio courts in civil cases. The parties may be represented by counsel at such hearing. The hearing shall be conducted, with respect to the administration of oaths, taking of depositions, issuing of subpoenas, the compulsory attendance of witnesses, and the production of books, accounts, papers, records, documents, and testimony, in accordance with section 4301.04 of the Revised Code.

Pursuant to the provision contained in section 4301.04 of the Revised Code, all requests for subpoenas to be issued by a party other than the liquor control commission, the department of public safety, or the division of liquor control shall be made in writing to the liquor control commission at least five days in advance of such hearing.

The commission may elect to use two-way video in place of in-person witness testimony in those cases where the commission determines that doing so will advance an important public policy. In cases where two-way video is utilized, the commission shall ensure that the testimony is the functional equivalent of in-person testimony by administering an oath to the witness, giving the defendant an opportunity to cross-examine the witness, and ensuring that the commission and the defendant have the opportunity to observe the witness's demeanor during testimony.

(E) In hearings before the commission, the burden of proof shall rest upon:

(1) The department of public safety or the division of liquor control, respectively, with regard to administration citations issued by them;

(2) The division of liquor control, with regard to any appeal, filed by the permit holder or applicant, of an order rejecting the issuance, transfer, or renewal of the permit;

(3) The legislative authority or board, with regard to any appeal filed by them;

(4) The former permit holder, with regard to any permit that has expired through failure to be renewed;

(5) The applicant, with regard to the discretionary waiver of the provisions of rule 4301:1-1-08 of the Administrative Code;

(6) The complainant, with regard to complaints filed pursuant to section 4301.27 of the Revised Code;

(7) The tax commissioner, with regard to the nonrenewal of any permit pursuant to division (D) of section 4303.271 of the Revised Code, due to the identification of the permit holder as being delinquent in filing any sales or withholding tax returns, as being liable for outstanding sales or

withholding tax, penalties, or interest, or identified as having been assessed by the department of taxation; or

(8) The agency responsible for collecting any excise tax, of which the failure of the permit holder to pay subjects the permit holder to suspension or revocation by the commission pursuant to section 4301.25 of the Revised Code.

(F) Any hearing may be postponed or continued by the commission on its own motion or at the request of any party for such period of time and upon such terms as the commission may prescribe. The party requesting continuance shall submit to the commission, at least five days prior to the date set for the hearing, a written request stating the reason for the desired continuance.

(G) Any attorney, appellant, permit holder, witness, or any other person who conducts himself or herself in a disorderly or contemptuous manner in any hearing before the commission, or about the offices of the commission, or who obstructs or delays or attempts to obstruct or delay the orderly submission, hearing, determination, or any matter before the commission may be reprimanded or suspended from practice before the commission for such period as the commission may determine. Each violation will constitute a separate case for reprimand or suspension.

(H) Any attorney who at any hearing makes a fraudulent statement or representation to any member of the commission, or who presents to, files with, or sends to the commission any statement that he or she knows contains false statements or representations may be suspended from practice before the commission for such a period of time as the commission may determine in each particular case. Each violation of this rule shall constitute a separate cause for suspension.

(I) Should any party to a hearing desire a rehearing or reconsideration by the commission, such party shall make known such desire in writing within fifteen days after a decision is rendered by the commission and shall accompany the motion with a verified statement setting out the grounds upon which such rehearing or reconsideration is sought. Should the grounds be newly discovered evidence not available at the time of the former hearing, the party shall state the nature of the evidence. Grounds for rehearing shall be for the following five causes only:

(1) For mistake, neglect, or omission on the part of the successful party or irregularity in obtaining a favorable decision or order on the part of the successful party.

(2) For fraud practiced by the successful party in obtaining a favorable decision or order.

(3) For unavoidable casualty or misfortune, preventing any party from prosecuting an appeal pending before the commission.

(4) When a decision or order was obtained, in whole or material part, by false testimony on the part of the successful party or any witness on the party's behalf, which ordinary prudence could not have anticipated or guarded against.

(5) Newly discovered evidence, material for the party applying for rehearing, which with reasonable diligence could not have been discovered and produced at the hearing and which is not merely corroborative of evidence produced or offered at the hearing.

(6) Grounds for a motion for reconsideration may be any of the above or any other reason contended to be a basis to modify the original decision.

(J) At all hearings before the commission, a record of the testimony shall be taken.

(K) In the event of a tie vote by the commission, the same shall constitute an affirmation of the action taken by the director of the department of public safety or the superintendent of liquor control.

(L) In any hearing within the commission's jurisdiction, the commission may appoint a referee or examiner to conduct the hearing. The referee or examiner shall have the same powers and authority in conducting the hearing as is granted to the commission. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the commission requires. The referee or examiner shall submit to the commission a written report setting forth his/her findings of fact and conclusions of law and a recommendation of the action to be taken by the commission. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon each party or his/her attorney or other representative of record, by certified mail. Either party may, within ten days of receipt of such copy of such written report and recommendation, file with the commission written objections to the report and recommendation, which objections shall be considered by the commission before approving, modifying, or disapproving the recommendation. The commission may grant extensions of time to either party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the commission until after ten days after service of such report and recommendation as provided in this provision. The commission may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the commission and the order of the commission based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the commission. No such recommendation shall be final until confirmed and approved by the commission as indicated by the order entered on its record of proceedings, and if the commission modifies or disapproves the recommendations of the referee or examiner, it shall include in the record of its proceedings the reasons for such modification or disapproval.

R.C. 119.032 review dates: 08/15/2011 and 08/15/2016

Promulgated Under: 119.03

Statutory Authority: 4301.03(A), 119.09

Rule Amplifies: 4301.28, 119.09

Prior Effective Dates: 5/5/66, 9/1/82, 11/1/85, 7/10/95, 7/1/01, 8/7/2006